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EXPANDING THE EFFECTIVENESS OF THE MASSACHUSETTS COMPREHENSIVE PERMIT LAW BY ELIMINATING ITS SUBSIDY REQUIREMENT

KENNETH FORTON*

Abstract: The United States is in an affordable housing crisis; the problem is particularly acute in Massachusetts. Local zoning—especially in the form of density controls—is probably the most significant cause of the crisis. To mitigate the power of local zoning Massachusetts passed the Comprehensive Permit Law, which allows local zoning boards of appeals to override local zoning if certain requirements are met. One of those requirements, a government subsidy to the developer, has in some instances hindered the construction of affordable housing. Typically, a subsidy is required as an incentive to builders; otherwise their projects would not be profitable enough for them. In localities where real estate values are high, however, a density bonus (being able to develop more units on the same piece of land) may be enough to incentivize builders. In areas where subsidies are not necessary, project oversight, now largely performed by subsidizing agencies, should be performed by the Department of Housing and Community Development or local housing authorities.

INTRODUCTION

The United States has been in an affordable housing crisis for at least thirty years.¹ An increasing percentage of very low income households spend more than half of their incomes on housing.² Al-

* Editor in Chief, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2000–01. The author wishes to thank his wife, Jessica, who shares his passion for justice in housing. He also wishes to thank Jane Jacobs for her inspiration.

¹ See HARVARD JOINT CENTER FOR HOUSING STUDIES, THE STATE OF THE NATION'S HOUSING: 2000, at 3 (2000) [hereinafter STATE OF THE NATION'S HOUSING]; Timothy J. Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2042–43, 2044 (1994); Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 535 (1992).

² See STATE OF THE NATION'S HOUSING, *supra* note 1, at 3. Very low income households earn less than 50% of area median income. See *id.* at 36.

most half of very low income renters paid more than half of their incomes in rent.³ While welfare-to-work programs have been successful in some ways, working will not get low income people out from under the burden of these unreasonably high housing costs.⁴

Though an important planning tool, local zoning is the most visible, and probably the most significant, cause of the affordable housing crisis.⁵ Density controls, such as large minimum lot sizes and height and multi-family restrictions, make affordable housing development especially difficult.⁶ Density controls make it far less lucrative for developers to build lower-cost homes or apartment buildings than to build market-rate residences.⁷ Furthermore, profit margins on affordable housing are generally lower than at-market housing, and thus market forces also drive developers to build larger and larger suburban houses.⁸

While the nation as a whole has made a half-hearted effort to build more affordable housing, Massachusetts has taken the problem more seriously by passing a far-reaching affordable housing statute, the Comprehensive Permit Law (also known as the Anti-Snob Zoning Act or 40B).⁹ If less than ten percent of a town's housing stock is subsidized, 40B allows local zoning boards of appeals to override local zoning and grant comprehensive permits to build affordable housing under a variety of subsidy programs.¹⁰ In the past decade, two "shallow" subsidy programs have been instrumental in getting affordable units built in the face of decreasing government funding.¹¹

Part I of this Note describes the problems 40B has attempted to address and the history of the statute's passage. Part II explains how 40B works. Part III discusses the implementation of 40B. Part IV notes the shift in affordable housing financing from command-and-control

³ See *id.*; Cushing N. Dolbeare, *The low income housing crisis, in AMERICA'S HOUSING CRISIS: WHAT IS TO BE DONE?* 29, 31-36 (Chester Hartman ed., 1983). As early as 1920, critics noted the disparity between rents and the ability to pay rent. See CHARLES HARRIS WHITTAKER, *THE JOKE ABOUT HOUSING* 37 (1920).

⁴ See STATE OF THE NATION'S HOUSING, *supra* note 1, at 23, 36. Of very low income working households who rent, 71% pay more than 30% of their incomes toward housing. See *id.* at 36. Thirty-two percent of working poor owners pay more than 50% of their incomes toward housing. See *id.*

⁵ See Choppin, *supra* note 1, at 2048; Stockman, *supra* note 1, at 536.

⁶ See Choppin, *supra* note 1, at 2045, 2047; Stockman, *supra* note 1, at 540-41.

⁷ See Stockman, *supra* note 1, at 540-41.

⁸ See *id.* at 541.

⁹ See MASS. GEN. LAWS ch. 40B, §§ 20-23 (1994 & Supp. 1999).

¹⁰ See *id.* §§ 20, 23.

¹¹ See text and notes *infra* Part IV. B, C.

programs to more market-driven programs. Part IV also explains 40B's government subsidy requirement and two more market-driven programs which fulfill the requirement: the Local Initiative Program and the New England Fund. Part V advocates for the repeal of the government subsidy requirement and argues in favor of government agency oversight in its place.

I. WORKING TOWARD A SOLUTION TO THE AFFORDABLE HOUSING CRISIS: PASSING CHAPTER 40B

A. *The Historical Problems 40B Attempted to Address*

As far back as 1890, the United States was in a housing crisis.¹² Finally, Congress passed the Housing Act of 1949,¹³ promising "a decent home and a suitable living environment for every American family."¹⁴ In the thirty years after the Housing Act was passed, however, the crisis only grew worse.¹⁵ By the 1960 Housing Census, 113,000 households (which accounted for more than 300,000 persons) in the Boston metropolitan area were living in substandard housing.¹⁶ Furthermore, a 1964 report found that the housing problem was "a metropolitan problem" because over half of the substandard units were in Boston's surrounding area and not the central city.¹⁷ Less than two percent of all units in the metropolitan area both met building codes

¹² See WHITTAKER, *supra* note 3, at 97. "[L]and in our cities has reached a figure, for house building sites, such as is prohibitive for houses for low wage or low salary workers." *Id.* See generally JACOB A. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* (Dover Publications, Inc. 1971) (1890) (chronicling the living conditions of low income workers in New York City's Lower East Side); LLOYD RODWIN, *HOUSING AND ECONOMIC PROGRESS: A STUDY OF THE HOUSING EXPERIENCES OF BOSTON'S MIDDLE-INCOME FAMILIES* (1961) (explaining the history of the relationship between rising income and available housing).

¹³ See Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).

¹⁴ Dolbeare, *supra* note 3, at 31.

¹⁵ See *id.* at 33. Between 1970 and 1980 available units at rents that those making less than \$3,000 per year could afford (paying 30% of their income) dropped by more than half. See *id.* In 1980, there were "more than twice as many renter households with incomes below \$3,000 as there [were] rental units available at 25 percent of their incomes." *Id.*

¹⁶ See CHESTER W. HARTMAN, *HOUSING ADVISORY RESEARCH COMMITTEE, MASSACHUSETTS COMMITTEE ON DISCRIMINATION IN HOUSING, LOW INCOME HOUSING IN THE BOSTON AREA: NEEDS AND PROPOSALS 2* (1964). These data probably undercount substandard units because the study did not examine environmental deficiencies, vermin infestation, or central heating. See *id.*

¹⁷ *Id.* at 3.

and were vacant, and the vacant units were relatively small and expensive.¹⁸

This shortage of affordable housing has been partially caused by racism.¹⁹ In the midst of racial upheaval and attempted integration of Boston's schools and public housing, the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights and the Massachusetts Commission Against Discrimination issued a report on housing discrimination in the Boston metropolitan area.²⁰ The report found that suburban development policies increased racial isolation.²¹

Suburban Boards of Appeals have been afraid to build affordable housing partially because they fear that minority residents will decrease property values.²² Rather than publicly state this fear, more savvy suburbs have followed a double standard in approving housing development.²³ Affordable housing requires community approval and strong community support.²⁴ Even if an affordable housing development receives some support, the Report found, community leaders and public officials can mask their true motives by "discovering" drainage, water, and traffic problems.²⁵ These tactics delay construction and increase costs to the developer, thus effectively making affordable housing far more difficult to build than market-rate hous-

¹⁸ See *id.* at 5–6.

¹⁹ See MASSACHUSETTS ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS AND THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, ROUTE 128: BOSTON'S ROAD TO SEGREGATION 55–73 (1975) [hereinafter ROUTE 128] (arguing that well entrenched, suburban, racially exclusive housing patterns exacerbate attempts to provide affordable housing).

²⁰ See *id.*

²¹ See *id.* at 55.

Racially exclusive housing patterns have become the accepted norm in Boston's suburban rings. The white segment of society exerts monopolistic control over virtually all buildable land, with little or no consideration of minority rights or needs. Suburban industry has, for the most part, failed to confront the consequences of locating in racially segregated towns. This failure has allowed patterns of exclusion to become well entrenched in suburban employment.

Id.

²² See *id.* at 55; cf. JOHN T. MCGREEVEY, PARISH BOUNDARIES: THE CATHOLIC ENCOUNTER WITH RACE IN THE TWENTIETH-CENTURY URBAN NORTH 79–110 (1996) (discussing the role urban Catholic parishes played in excluding minorities from neighborhoods to protect property values).

²³ See ROUTE 128, *supra* note 19, at 60.

²⁴ See *id.*

²⁵ See *id.*

ing.²⁶ Market-rate or luxury developers, on the other hand, are given more latitude.²⁷

In addition to being racially discriminatory, suburban development policies have worked against families and children.²⁸ Education is largely financed by local property taxes; generally, these taxes are levied on all non-government land, whether residential, commercial, or industrial.²⁹ Only residential land, however, generates children to be educated.³⁰ Thus, to the extent that the town reduces or limits the number of children that must be educated, the lower it can keep property taxes.³¹

Near-Boston suburbs embraced this logic while the new Route 128 was being built.³² During that period towns generally used two methods to limit the number of children in their communities.³³ Some towns promoted a heavy concentration of less desirable industries, while others boosted minimum residential lot sizes.³⁴ Towns prefer industry because it does not increase the number of children in a town, and fewer children live on a two acre estate than in a 150 unit apartment building built on two acres.³⁵

Compounding the problems of racial and family/child exclusion, the Boston Metropolitan area's attempts at urban renewal made no allowances for creating new housing units to replace the ones demolished for the construction of the new Route 128 and other highway projects.³⁶ Boston's West End, for instance, an Italian-American working class neighborhood, was completely razed in the late 1950s to

²⁶ See *id.* at 60–61. "Throughout the suburbs, town committees and town boards will spend more time investigating one moderate income housing proposal than they devote to planning the development of the town as a whole." *Id.* at 61.

²⁷ See *id.* at 61.

²⁸ See ROUTE 128, *supra* note 19, at 42.

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.* at 42. "The reliance on property tax to finance education and town services and the increased demand for housing made it more economical for low density towns to remove land from the market entirely than to risk an increase in the number of families who could not share the tax burden." *Id.* at 42

³³ See ROUTE 128, *supra* note 19, at 42.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See JAMES BREAGY, CITIZENS HOUSING AND PLANNING ASSOCIATION OF METROPOLITAN BOSTON, OVERRIDING THE SUBURBS: STATE INTERVENTION FOR HOUSING THROUGH THE MASSACHUSETTS APPEALS PROCESS 5–6 (1976).

build the Government Center complex.³⁷ Urban renewal planners naively predicted that the suburbs would help absorb the thousands of dislocated low income households by allowing construction of affordable units scattered in small developments among the suburban towns.³⁸ Exclusionary zoning in the suburbs, however, made these predictions moot.³⁹

Suburban local zoning has probably been the most significant cause of the affordable housing crisis.⁴⁰ Local zoning practices, especially the use of large minimum lot sizes and height and multi-family restrictions, make building affordable housing units financially infeasible for developers.⁴¹ To build more units of affordable housing, then, developers needed a way to override exclusionary zoning practices.⁴² Developers also needed subsidies to make construction of affordable units more financially feasible.⁴³

B. *Passing the Comprehensive Permit Law*

In 1969, the Massachusetts Legislature provided developers a zoning override in the form of the Comprehensive Permit Law (40B).⁴⁴ Under 40B, if the state or federal government provides a subsidy to a developer, 40B provides a zoning override.⁴⁵ Passage of the 40B was extraordinary, given New England's strong tradition of local control and town government.⁴⁶ Furthermore, Massachusetts's recently passed Home Rule Amendment had given municipalities further local control.⁴⁷

Massachusetts's cities and suburbs were also in conflict over de facto school segregation in Boston and other cities.⁴⁸ In 1966, liberals in the Legislature, many of whom were from the suburbs, helped pass a state racial imbalance law, which, if it was actually implemented,

³⁷ See MATTHEW EDEL ET AL., SHAKY PALACES: HOMEOWNERSHIP AND SOCIAL MOBILITY IN BOSTON'S SUBURBANIZATION 31 (1984).

³⁸ See BREAGY, *supra* note 36, at 6.

³⁹ See *id.*

⁴⁰ See Choppin, *supra* note 1, at 2048; Stockman, *supra* note 1, at 536.

⁴¹ See Stockman, *supra* note 1, at 540–41.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See generally MASS. GEN. LAWS ch. 40B, §§ 20–23 (1969).

⁴⁵ See *id.* § 23.

⁴⁶ See BREAGY, *supra* note 36, at 9–10.

⁴⁷ See MASS. CONST. art. 89.

⁴⁸ See BREAGY, *supra* note 36, at 9.

would have forced cities to integrate their schools.⁴⁹ City legislators who represented white working class neighborhoods, especially those from Boston, opposed the racial imbalance legislation.⁵⁰ The city legislators resented these “limousine liberals” in the suburbs who, it appeared, were forcing their views on the cities.⁵¹

In 1969, these resentful working class democrats formed a coalition with pro-housing liberals, including some Republican suburbanites, to pass 40B.⁵² It was ironic that city legislators supported 40B, since many of them had fought against affordable housing in their own cities.⁵³ One of 40B’s primary supporters later described this coalition as a “one-shot deal . . . for better or worse, a rather unholy alliance.”⁵⁴

Against this background, 40B became law on August 23, 1969.⁵⁵ Unlike the New York Urban Development Corporation (UDC), 40B was a passive program.⁵⁶ The UDC gave New York the power directly to redevelop its cities and attempt to distribute affordable housing through new development and fair share allocations.⁵⁷ Perhaps because it was so directly confrontational, the UDC was eventually eviscerated when villages and towns were given the power to disapprove any UDC projects.⁵⁸

The Comprehensive Permit Law, on the other hand, was more passive than the UDC.⁵⁹ In passing 40B, the legislature intended to

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See BREAGY, *supra* note 36, at 9–10. (quoting Statement of State Rep. Martin Linsky (R–Brookline) at Suburban Housing Conference, Brandeis University, May 1971); see ANN VERRILLI, CITIZENS’ HOUSING AND PLANNING ASSOCIATION, USING CHAPTER 40B TO CREATE AFFORDABLE HOUSING IN SUBURBAN AND RURAL COMMUNITIES OF MASSACHUSETTS: LESSONS LEARNED AND RECOMMENDATIONS FOR THE FUTURE 7 (1999).

⁵⁵ See VERRILLI, *supra* note 54, at 7.

⁵⁶ See BREAGY, *supra* note 36, at 3, 5.

⁵⁷ See *id.*

⁵⁸ See *id.* at 3.

⁵⁹ See *id.* The Comprehensive Permit Law sought to strike a balance between local power and developers’ power to override local zoning. See *id.* The Committee on Urban Affairs, seeking that balance of interests, found in their 1969 report that

the first and primary responsibility for the healthy growth of any city or town ought to be vested in that city or town. The accompanying bill [40B], while not permitting cities and towns to unreasonably obstruct the construction of a limited amount of adequate low cost housing, encourages such communities to establish conditions on such housing which will be consistent with local needs. This measure provides the least interference with the power of a

provide relief from exclusionary zoning practices that prevented the construction of much needed low and moderate income housing.⁶⁰ Specifically, 40B sought to create new units of affordable housing in suburbs where large lot requirements and multi-family and height restrictions made building affordable units nearly impossible.⁶¹ The statute provides a streamlined procedure whereby a developer may obtain a comprehensive permit to build, rather than forcing the developer to file separate applications with each local agency or official having jurisdiction over various aspects of the proposed project.⁶²

II. CHAPTER 40B, THE COMPREHENSIVE PERMIT LAW

A. *Application for a Comprehensive Permit Under Chapter 40B*

Under Chapter 40B, a public agency or any non-profit or limited dividend organization with preliminary subsidy approval for the construction of low or moderate income housing⁶³ can submit an application for a comprehensive permit to a local zoning board of appeals.⁶⁴ Next, the zoning board of appeals will approve the application or approve it subject to conditions that do not make the project “uneconomic.”⁶⁵ Conditions are “uneconomic” if they make it “impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return”⁶⁶ The board of appeals may also deny a comprehensive permit application or approve it with conditions which make the project uneconomic, but only if the local decision is “consis-

community to plan for its own future in accommodating the housing crisis which we face.

VERRILLI, *supra* note 54, at 7 (quoting Report of the Committee on Urban Affairs (June 1969)).

⁶⁰ See Board of Appeals v. Housing Appeals Comm., 294 N.E.2d 393, 405–06 (Mass. 1973); MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW § 18.1, at 664 (1993 & Supp. 1999).

⁶¹ See VERRILLI, *supra* note 54, at 7.

⁶² See Board of Appeals, 294 N.E.2d at 401; BOBROWSKI, *supra* note 60, § 18.1, at 666.

⁶³ Under § 20 of 40B, “low or moderate income housing” is “any housing subsidized by the federal or state government, under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.” MASS. GEN. LAWS ch. 40B, § 20.

⁶⁴ See *id.* §§ 20, 21; BOBROWSKI, *supra* note 60, § 18.1, at 665.

⁶⁵ See MASS. GEN. LAWS ch. 40B, §§ 20–21; BOBROWSKI, *supra* note 60, § 18.1, at 665.

⁶⁶ MASS. GEN. LAWS ch. 40B, § 20.

tent with local needs.”⁶⁷ Under 40B, conditions which make a project uneconomic can only be “consistent with local needs” if the town’s housing stock is at least ten percent affordable or the proposed site is exceedingly large.⁶⁸

B. *Appeal to the Housing Appeals Committee*

If a comprehensive permit is denied or if a developer thinks uneconomic conditions have been imposed upon the development, she may appeal the zoning board’s decision to the Housing Appeals Committee of the Department of Housing and Community Development (HAC).⁶⁹ Other aggrieved persons, abutters for instance, may intervene in the HAC proceedings or appeal the zoning board’s decision to a state court.⁷⁰ When a developer appeals the board’s decision to the HAC, the HAC conducts a de novo review of the application.⁷¹ Where the decision is not consistent with local needs, the HAC is empowered to vacate or modify the decision and to order the issuance of a comprehensive permit.⁷²

Proof that a municipality does not satisfy the statutory minimum of ten percent low and moderate income housing creates a rebuttable presumption that the regional housing need outweighs local health, safety, design, or planning concerns.⁷³ Where a municipality rebuts

⁶⁷ Under § 20 of 40B, requirements and regulations are

consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants . . . , to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.

Id.

⁶⁸ *See id.* Conditions may be consistent with local needs if the proposed site is greater than three tenths of one percent of the municipality’s total land area or ten acres, which ever is larger, in any one calendar year. *See id.*

⁶⁹ *See id.* § 22; BOBROWSKI, *supra* note 60, § 18.1, at 665.

⁷⁰ *See* MASS. GEN. LAWS ch. 40A, § 17; MASS. GEN. LAWS ch. 40B, §§ 21–22; MASS. REGS. CODE tit. 760, § 30.04(2) (1993) [hereinafter citations to the Code of Massachusetts Regulations will be designated “CMR,” e.g., 760 CMR § 30.04(2)]; BOBROWSKI, *supra* note 60, § 18.1, at 665.

⁷¹ *See* MASS. GEN. LAWS ch. 40B, § 22; Board of Appeals v. Housing Appeals Comm., 294 N.E.2d 393, 415 (Mass. 1973); BOBROWSKI, *supra* note 60, §§ 18.1, 18.7, at 665, 698–99.

⁷² *See* MASS. GEN. LAWS ch. 40B, § 23; 760 CMR § 31.08(1)(a); BOBROWSKI, *supra* note 60, §§ 18.1, 18.7.4, at 665, 698.

⁷³ *See Board of Appeals*, 294 N.E.2d at 413; 760 CMR §§ 31.06(4), 31.07(1)(e).

this presumption, the HAC applies a balancing test, weighing local planning concerns against the regional need for housing.⁷⁴ In balancing the local planning concerns against the regional need for housing, the HAC bases the regional need for housing on the proportion of the municipality's population consisting of low income persons.⁷⁵ The HAC bases the local planning concern on

the degree to which the natural environment is *endangered*, the degree to which the design of the site and the proposed housing is *seriously deficient*, the degree to which additional open spaces are *critically needed* in the city or town, and the degree to which the local requirements and regulations bear a direct and substantial relationship to the protection of such local concerns⁷⁶

Under these strict standards, local planning concerns rarely outweigh a town's regional housing need.⁷⁷ In short, 40B gives a town almost no chance of denying a developer's application without the HAC vacating its decision and directing the local board to issue a comprehensive permit.⁷⁸

If the local board imposes conditions on a development and the developer appeals to the HAC, then the HAC may either uphold the conditions or modify them.⁷⁹ When the HAC reviews a local board's decision to impose conditions on a development, four results are possible.⁸⁰ First, if the conditions are uneconomic, and they are not consistent with local needs, then the HAC will modify the conditions.⁸¹ Second, if the conditions are uneconomic but they are consistent with local needs, then the HAC will uphold the conditions.⁸² Third, if the

⁷⁴ See 760 CMR § 31.07(2).

⁷⁵ See *id.* § 31.07(2)(a).

⁷⁶ *Id.* § 31.07(2)(b) (emphasis added); cf. Southern Burlington County NAACP v. Mt. Laurel, 336 A.2d 713, 731, 734 (N.J. 1975) (striking down a one-half acre per detached single-family dwelling unit minimum lot size when the town argued the zoning provision was necessary for proper individual lot sewage disposal and water supply). In *Mt. Laurel*, the court found environmental protection to be a "makeweight to support exclusionary housing measures," since the town could merely exact new sewers from developers. *Mt. Laurel*, 336 A.2d at 731.

⁷⁷ See BOBROWSKI, *supra* note 60, § 18.7.3.1, at 707.

⁷⁸ See *Board of Appeals*, 294 N.E.2d at 417-18.

⁷⁹ See MASS. GEN. LAWS ch. 40B, § 23.

⁸⁰ See BOBROWSKI, *supra* note 60, § 18.7.3.2, at 709-10.

⁸¹ See MASS. GEN. LAWS ch. 40B, § 23; BOBROWSKI, *supra* note 60, § 18.7.3.2, at 709.

⁸² See MASS. GEN. LAWS ch. 40B, § 23; 760 CMR § 31.05(3); BOBROWSKI, *supra* note 60, § 18.7.3.2, at 709-10.

conditions are not uneconomic and are consistent with local needs, then the HAC will uphold them because, under title 760 of the Massachusetts Regulations, section 31.06(3), if a condition does not make a project uneconomic, then the developer has not sustained its burden of proof and no further inquiry into consistency with local needs is necessary.⁸³ Finally, if the conditions are not uneconomic, but they are still not consistent with local needs, the conditions should be upheld because they are consistent with the legislative intent of the Act—to permit affordable housing without undue intrusion on local prerogatives.⁸⁴

Because most towns' subsidized housing inventory is well below ten percent, when a decision is appealed, it is likely that any uneconomic conditions will be modified by the HAC because the conditions will not be considered consistent with local needs under the statute.⁸⁵ The HAC, however, will probably uphold any conditions that a non-compliant town imposes, as long as they are not uneconomic under 40B.⁸⁶ For instance, to protect a town's water supply, the board of appeals may be able to force a developer to install sewer and drainage lines for a proposed development so long as they do not make the project uneconomic.⁸⁷ If the conditions do make the project uneconomic, then the town may argue either that the development *endangers* the environment or that the town has a valid planning concern.⁸⁸ In practice, however, the HAC rarely finds valid planning concerns or danger to the environment for purposes of issuing comprehensive permits under 40B because most towns do not enforce their planning and environmental concerns equally against subsidized and market rate housing.⁸⁹

⁸³ See 760 CMR § 31.06(3); BOBROWSKI, *supra* note 60, § 18.7.3.2, at 710.

⁸⁴ See 760 CMR § 31.06(3); BOBROWSKI, *supra* note 60, § 18.7.3.2, at 710.

⁸⁵ See MASS. GEN. LAWS ch. 40B, §§ 20, 23; BOBROWSKI, *supra* note 60, § 18.7.3.2, at 710.

⁸⁶ See 760 CMR § 31.06(3).

⁸⁷ See *id.*

⁸⁸ See *id.* at § 31.07(2)(a)–(b).

⁸⁹ See *id.*; see, e.g., Harbor Glen Associates v. Hingham, No. 80–06 (Mass. Housing Appeals Comm., Aug 20, 1982) (strictly enforcing 40B against town because two market rate developments were allowed to increase nitrogen discharges into water supply while a similar affordable development was rejected for increasing nitrogen discharges).

III. THE IMPLEMENTATION OF 40B

The implementation of Chapter 40B can be divided into four historical phases.⁹⁰ First, from 1970 to 1973, the constitutionality of the law was established.⁹¹ In these early years, nearly all comprehensive permit applications were denied and none of the seventeen proposed projects were built.⁹² In the second phase, a track record for 40B was established.⁹³ During this period there were dramatic decreases in the number of comprehensive permit denials because municipalities were more likely to approve permit applications with conditions.⁹⁴ Progress was still slow: in the 1970s, only 40% of the projects and 30% of the units for which permit applications were filed were built.⁹⁵ At the same time, federal and state housing policy changes made building subsidized units more difficult.⁹⁶ Despite these unfavorable conditions, affordable units almost doubled from 85,600 in 1972 to over 165,000 in 1983.⁹⁷ But, the available data from a study by the Citizens' Housing and Planning Association shows that only approximately 4400 units could be attributed to 40B.⁹⁸

The third phase from 1983 to 1989 saw an explosion in housing programs and, unfortunately, in rents and home prices as well.⁹⁹ Still facing local opposition, the Legislature created the Massachusetts Housing Partnership Fund (MHP) to administer programs to pro-

⁹⁰ See VERRILLI, *supra* note 54, at 8.

⁹¹ See *id.* The Supreme Judicial Court held 40B constitutional in *Board of Appeals v. Housing Appeals Comm.*, 294 N.E.2d 393, 410, 414 (Mass. 1973).

⁹² See VERRILLI, *supra* note 54, at 8. It took six years from the passage of 40B in 1969 to get the first project built in Weymouth in 1975, which was a 198-unit project for the elderly. See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.* at 9.

⁹⁶ See *id.* In 1973, President Nixon imposed a moratorium on housing programs. See *id.* at 9. In late 1974, Congress "scrapped" the major federal housing program for private interest subsidies, cut funding for federal public housing construction, and began the Section 8 rental assistance program. See *id.* When federal subsidies began to increase, Governor Dukakis shifted state housing funds to urban development, not suburban development. See *id.* By the early 1980s, Congress had reduced funding for new units to less than 20% of what was available in the late 1970s. See *id.*

⁹⁷ See *id.*

⁹⁸ See *id.* at 10.

⁹⁹ See VERRILLI, *supra* note 54, at 10. Median home prices doubled between 1982 and 1986 and continued to rise until 1989. See *id.* While the Reagan administration continued to cut back federal housing programs, Massachusetts created three new state programs: the State Housing Assistance for Rental Production program (SHARP), the Tax Exempt Loans to Encourage Rental Production program (TELLER), and the Rental Housing Development Action Loan (RDAL). See *id.*

duce more affordable housing and broaden homeownership in general by creating Local Housing Partnerships (LHPs).¹⁰⁰ LHPs, informal coalitions of local legislators, planners, builders, clergy, business people, and the like, were encouraged to solve housing needs locally.¹⁰¹

In 1986, the MHP developed the Homeownership Opportunity Program (HOP), which provided below market mortgages to lower-income first time buyers in state-approved units.¹⁰² HOP was created to be used by LHPs, but rising real estate market prices attracted many for-profit developers who could earn a quicker return and let the state oversee long-term affordability.¹⁰³ Localities were flooded with “unfriendly” comprehensive permit applications—ones with no community support—so HOP changed its application process to take local concerns into account.¹⁰⁴

In 1987, still not appeased by HOP, communities supported twenty-four different bills to repeal or amend 40B.¹⁰⁵ In response, a Special Commission was created to study 40B, evaluate its progress, and make recommendations for the future.¹⁰⁶ The Commission’s 1989 report recommended that 40B not be changed, but that the definition of “subsidized unit” be expanded to include developments sponsored by municipalities without traditional state and federal subsidies.¹⁰⁷ Thus, the Department of Housing and Community Development (DHCD) created the Local Initiative Program (LIP), which allows affordable units built under local control to count toward the municipality’s affordable housing inventory.¹⁰⁸ Under LIP, “subsidy” is defined as state technical assistance and oversight, thus allowing the use of a comprehensive permit.¹⁰⁹ This note will discuss LIP in detail in Section IV.

Finally, in the early- and mid-1990s, comprehensive permit applications decreased due to major cuts in traditional state and federal

¹⁰⁰ See *id.* at 10–11.

¹⁰¹ See *id.* at 11.

¹⁰² See *id.*

¹⁰³ See VERRILLI, *supra* note 54, at 11. HOP required only 25% of the units built to be affordable and 40% if a comprehensive permit was used. See *id.* Unfortunately, this caused even more local opposition because only the affordable units built counted toward the municipalities’ 10% affordable housing inventory. See *id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* at 11–12.

¹⁰⁶ See *id.* at 12.

¹⁰⁷ See VERRILLI, *supra* note 54, at 12.

¹⁰⁸ See *id.*

¹⁰⁹ See 760 CMR § 45.02; VERRILLI, *supra* note 54, at 12.

subsidy programs, a move to shallow subsidy programs, and a weaker housing market.¹¹⁰ The 1990s also saw a significant change in the model of affordable housing development.¹¹¹ “Shallow subsidies and market-driven development,” says Werner Lohe, Chairman of the Housing Appeals Committee,

have replaced the deep subsidies of the 1970s and 1980s. In the past, large grants or loans that constituted significant proportions of total development costs were provided . . . under a “command and control” model. That is, in return for the subsidies, state or federal officials through their regulatory authority, retained considerable control over the design and operation of the housing. Today, however, there has been a significant shift . . . toward market driven . . . programs in which cash subsidies and bureaucratic supervision are minimized.¹¹²

Two such market driven programs are the Local Initiative Program and the New England Fund, both discussed below in Section IV.

IV. MARKET DRIVEN SUBSIDY PROGRAMS

Much has been written about 40B, but nearly all scholarly criticism of it has focused on the statute’s zoning override procedures and potential for delay.¹¹³ Very little has been written about how 40B and the HAC should take account of the radical changes in financing af-

¹¹⁰ See 760 CMR § 45.02; VERRILLI, *supra* note 54, at 13. “About 168 [comprehensive permit] applications were filed between 1990 and 1997—an average of 24 a year, compared to an average of 47 a year in the late 1980s, and over 40% (73) used the LIP program.” VERRILLI, *supra* note 54, at 13. Massachusetts’s severe fiscal crisis also decreased the funds available to form local partnerships. *See id.*

¹¹¹ See *Stuborn Ltd. Partnership v. Barnstable Bd. of Appeals*, Decision of Jurisdiction, No. 98–01, at 6–7 (Mass. Housing Appeals Comm., Mar. 5, 1999).

¹¹² *Id.*

¹¹³ See Emily Fabrycki Reed, *Tilting at Windmills: The Massachusetts Low and Moderate Income Housing Act*, 4 W. NEW ENG. L. REV. 105, 120–23 (1981) (criticizing HAC delay and suburban use of “dilatatory tactics” to slow the comprehensive permit process); Stockman, *supra* note 1, at 577–78; Paul M. Vaughn, Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U. L. REV. 37, 50–52 (1974) (criticizing procedural problems of attaining a comprehensive permit). *But see* Roman Petyk & Daniel D. Sullivan, *The Anti-Snob Zoning Act: New Potential in a Booming Housing Market*, BOSTON BAR J., July/Aug. 1986, at 10, 16 (arguing that internally subsidized comprehensive permit proposals promote the underlying goals of 40B); Daniel D. Sullivan & Josephine A. McNeil, *The Anti-Snob Zoning Act: New Direction in a Soft Market*, BOSTON B. J., July/Aug. 1990, at 9–10 (arguing that the Local Initiative Program is a step toward complete internal subsidization of affordable housing projects).

fordable housing, exemplified by the change from government command-and-control to a market-incentive approach to affordable housing.¹¹⁴ It is especially important for 40B and the HAC to keep pace with the changes in financing affordable housing, since traditional public housing is being blown up, state and federal funds have all but dried up, and privatization is the political and economic theme of the day.¹¹⁵

While the HAC has generally kept pace with the changes in affordable housing financing, 40B has not.¹¹⁶ Chapter 40B, passed when command-and-control programs were popular, still requires developers to obtain government subsidies to apply for a comprehensive permit.¹¹⁷ As financing methods have changed, the HAC has merely interpreted what counts as a government subsidy more broadly.¹¹⁸

Recently, two programs have emerged which do not require traditional, large cash subsidies: the Local Initiative Program and the New England Fund, which will be discussed further in this section.¹¹⁹ These two programs mark a transition between the command-and-control programs of the past and the possibility of subsidy-less affordable housing development.¹²⁰

¹¹⁴ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6-7; Werner Lohe, Chairman, Housing Appeals Committee, Command and Control to Local Control: The Environmental Agenda and the Comprehensive Permit Law, Remarks at the Western New England College School of Law Symposium: Increasing Affordable Housing and Regional Housing Opportunity in Three New England States and New Jersey: Comparative Perspectives on the Occasion of the Thirtieth Anniversary of the Massachusetts Comprehensive Permit Law 3 (Dec. 10, 1999) (transcript available from author); Reed, *supra* note 113, at 120-23; Stockman, *supra* note 1, at 577-78; Vaughn, *supra* note 113, at 50-52; cf. Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267, 1267-73 (discussing the shift in environmental regulations from command-and-control to economic incentive systems). But see Petyk & Sullivan, *supra* note 113, at 10, 16; Sullivan & McNeil, *supra* note 113, at 9-10.

¹¹⁵ *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6-7; VERRILLI, *supra* note 54, at 13.

¹¹⁶ See MASS. GEN. LAWS ch. 40B, §§ 20-23. Chapter 40B has remained essentially unchanged since it was passed in 1969. See *id.*; *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6.

¹¹⁷ See 760 CMR § 31.01(1)(b).

¹¹⁸ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 7; Hastings Village, Inc. v. Wellesley Zoning Bd. of Appeals, Memorandum on Motion to Dismiss, No. 95-05, slip op. at 26 (Mass. Housing Appeals Comm., Mar. 21, 1996).

¹¹⁹ See *infra*, Part IV. B, C.

¹²⁰ See *infra* Part V.

A. *The Subsidy Requirement Under 40B*

1. Definition

To be eligible for a comprehensive permit, a project must be “fundable by a subsidizing agency under a low or moderate income housing subsidy program.”¹²¹ Low or moderate income housing is “housing subsidized by [a] federal and/or state government and/or local housing authority”¹²²

2. The Shift From Command-and-control Programs to Market-Based Incentives

When 40B was passed, during the implementation of the “Great Society” programs, government still played a large role in building and managing low and moderate income housing.¹²³ Housing and other programs were implemented through the command-and-control model.¹²⁴ Under that model, federal and state government deci-

¹²¹ 760 CMR § 31.01 (1) (b); see *Stuborn*, Decision on Jurisdiction, No. 98–01, at 8.

¹²² 760 CMR § 30.02; *Stuborn*, Decision on Jurisdiction, No. 98–01, at 8.

¹²³ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 26. For a general history of “Great Society” programs, see generally JOHN A. ANDREW III, LYNDON JOHNSON AND THE GREAT SOCIETY (1998); THE GREAT SOCIETY AND ITS LEGACY (Marshall Kaplan & Peggy L. Cuciti eds., 1986). After President Kennedy’s assassination in 1963, President Johnson began to implement his vision of the Great Society. See ANDREW, *supra*, at 12–14, 18. Great Society programs sought to provide opportunities “for full participation in American political and economic life so that all might have a share of its abundance.” KAPLAN & CUCITI, *supra*, at 2. President Johnson and his administration implemented these programs to fight poverty and secure civil rights by appointing task forces of experts to solve problems. See ANDREW, *supra*, at 16. Government would then merely fund the programs. See *id.* The task forces’ solutions, however, did not meet with much grass roots support at first. See *id.* at 16–17. This top-down approach made the Great Society difficult to implement because it seemed alien and elitist. See *id.* at 17. “[L]ocal communities did not wish to be homogenized in some great national blender whose switch was controlled from the White House.” *Id.* Great Society programs became so unpopular that the Democratic Clinton administration was complicit in Republican Newt Gingrich’s dismantling of welfare, while the Supreme Court has been equally effective in repealing affirmative action programs. See *id.* at 3–4. See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (finding strict scrutiny must be applied to race-based affirmative action programs imposed by Congress); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (finding state and local minority “set-asides” for construction contracts violate Equal Protection Clause); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (finding reservation of college admission slots for minorities violates Equal Protection Clause).

¹²⁴ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 26; see also *Stuborn*, Decision on Jurisdiction, No. 98–01, at 6–7; Lohe, *supra* note 113, at 3; Reed, *supra* note 113, at 120–23; Vaughn, *supra* note 113, at 50–52; cf. Latin, *supra* note 114, at 1267–73. But see Petyk & Sullivan, *supra* note 114, at 10, 16; Sullivan & McNeil, *supra* note 113, at 9–10.

sion-makers use their centralized control to regulate and impose improvements on local communities.¹²⁵ Shortly after 40B was passed, however, a gradual ideological shift occurred, from command-and-control programs to government programs employing market-enlisting strategies.¹²⁶ Rather than have government manage programs, market-enlisting programs give incentives to private industry to achieve the same goals.¹²⁷

The Comprehensive Permit Law, according to Werner Lohe, Chairman of the HAC, anticipated the move from command-and-control programs to market-based regulation.¹²⁸ Accordingly, in its decisions, the HAC has reinforced the importance of local control.¹²⁹

3. The Purpose of the Subsidy Requirement

When 40B was passed in 1969, housing subsidies in Massachusetts were provided by two main subsidizing agencies: the Massachusetts Housing Finance Agency (MHFA) and the Federal Housing Administration (FHA).¹³⁰ In the early years of 40B, most affordable developments were financed by MHFA.¹³¹ As a result, MHFA became familiar with the comprehensive permit process, and reviewed projects with the comprehensive permit requirements in mind.¹³² When developers received subsidies from MHFA, they also received "site approval letters."¹³³

¹²⁵ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 26; see also *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6-7; Lohe, *supra* note 113, at 3; Reed, *supra* note 113, at 120-23; Stockman, *supra* note 1, at 577-78; Vaughn, *supra* note 113, at 50-52; cf. Latin, *supra* note 114, at 1267-73.

¹²⁶ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 26; Lohe, *supra* note 113, at 2-3.

¹²⁷ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 26; Lohe, *supra* note 113, at 2-3.

¹²⁸ See Lohe, *supra* note 113, at 3.

¹²⁹ See *id.* (citing the importance of Harbor Glen Assocs. v. Hingham, No. 80-06 (Mass. Housing Appeals Comm., Aug 20, 1982)). In *Harbor Glen*, the Town of Hingham carefully planned the use of a 750-acre former Naval armunitions depot. See *id.* The town included significant parcels for multi-family and affordable housing. See *id.* When a developer submitted a comprehensive permit to build housing in an office park district, the HAC upheld the town's denial of the permit because the town had carefully planned for affordable housing. See *id.*

¹³⁰ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 4.

¹³¹ See *id.* at 21.

¹³² See *id.* at 22.

¹³³ See *id.* at 6-7.

Site approval letters served several purposes.¹³⁴ Besides checking the physical site, architect's plans, and financial feasibility of the project, the site approval letter provided assurance that the project met the comprehensive permit requirements.¹³⁵ An MHFA site approval letter also meant that MHFA would continue to be involved in the project.¹³⁶ Most importantly, MHFA monitored the long term affordability and use restrictions on the project.¹³⁷ Thus, requiring a traditional government subsidy and its accompanying site approval letter gave municipalities some assurance that, while their zoning bylaws were being overridden by developers, the subsidizing agency would at least screen out unrealistic proposals which would otherwise unnecessarily "tie up" a site.¹³⁸

As affordable housing financing changed, the HAC adapted its procedures to other programs which provided similar assurances: the Farmers Home Administration, Tax Exempt Local Loans to Encourage Rental Housing (TELLER), and the Homeownership Opportunities Program (HOP).¹³⁹ In addition, in the last decade two new non-traditional subsidy programs have developed: the Local Initiative Program (LIP) and the New England Fund (NEF).¹⁴⁰ Neither program uses command-and-control-style, large cash subsidies to promote construction of affordable units.¹⁴¹ These two programs, as approved by the HAC, nevertheless protect municipalities' interests by requiring either private or government oversight.¹⁴²

B. *The Local Initiative Program*

In response to the HAC's power and the 1989 Report of the Special [Legislative] Commission Relative to the Implementation of Low and Moderate Housing Provisions (hereinafter Special Commission

¹³⁴ See *id.* at 22–27.

¹³⁵ See *id.* at 22–23.

¹³⁶ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 23.

¹³⁷ See *id.* at 22.

¹³⁸ See *id.* at 25. Furthermore, towns prefer site letters because, unlike regulatory agreements between developers and lenders, site letters are filed with a comprehensive permit application and are open for public scrutiny. See *id.*

¹³⁹ See *id.* at 4–5.

¹⁴⁰ See 760 CMR § 45.00; NEF Eligibility Guidelines (last revised 4/27/98) <<http://www.fhlbboston.com/products/nef.html>> [hereinafter *NEF Eligibility Guidelines*].

¹⁴¹ See 760 CMR § 45.00; *NEF Eligibility Guidelines*, *supra* note 140.

¹⁴² See 760 CMR § 45.00; *NEF Eligibility Guidelines*, *supra* note 140; see also *Stuborn*, Decision on Jurisdiction, No. 98–01, at 25–28 (arguing that the NEF sufficiently protects local interests).

Report), the Department of Community Affairs promulgated regulations establishing the LIP.¹⁴³ Recognizing the political shift from command-and-control to market-based incentives, the Special Commission recommended that local "programs providing for subsidies in kind or through technical or other supportive services . . . be considered subsidies within the intent of M.G.L. c. 40B."¹⁴⁴

The purpose of the LIP is to get towns involved in the construction of low and moderate income housing that does not require federal or state financial assistance.¹⁴⁵ Unlike traditional subsidy programs, which require federal or state approval for every aspect of the project, the LIP leaves these decisions to be made at the local level.¹⁴⁶ For towns, local control of projects means protection of local interests.¹⁴⁷ LIP projects also require local approval, further protecting local interests.¹⁴⁸

Under the LIP, the municipalities may encourage developers to build "Low and Moderate Income Units," which regulations define as "unit[s] for which the purchase price or rent has been established, in conjunction with a Use Restriction¹⁴⁹ or Regulatory Agreement,¹⁵⁰ . . . to ensure that [the units] will be purchased or rented by a household with income at or below 80% of the regional median household income."¹⁵¹ Any firm that executes a Regulatory Agreement is consid-

¹⁴³ See 760 CMR § 45.00; Special Commission Relative to the Implementation of Low and Moderate Housing Provisions, Report of the Special Commission Relative to the Implementation of Low and Moderate Housing Provisions *passim* (1989) (unpublished report, on file at the State Library of Massachusetts) [hereinafter Special Comm'n Report]; Stockman, *supra* note 1, at 556.

¹⁴⁴ 760 CMR § 45.01.

¹⁴⁵ See *id.*; Special Comm'n Report, *supra* note 143, at 21.

¹⁴⁶ See 760 CMR § 45.00 *passim*; Special Comm'n Report, *supra* note 143, at 21; VERRILLI, *supra* note 54, at 12.

¹⁴⁷ See VERRILLI, *supra* note 54, at 12.

¹⁴⁸ See 760 CMR §§ 45.03-.04.

¹⁴⁹ A "Use Restriction" is "a contract, mortgage agreement, deed restriction, condition of zoning approval, or other legal instrument . . . which restricts occupancy of Low and Moderate Income Units to persons with qualified incomes." *Id.* § 45.02.

¹⁵⁰ A "Regulatory Agreement" is

an agreement . . . in which a developer agrees to develop Low and Moderate Income Units in accordance with Use restrictions and agrees (a) for rental housing, to limit distribution of return to all partners or legal or beneficial owners to no more than ten percent of equity per year during the term of such agreement or (b) for ownership of housing, to limit profit to all such partners or owners to no more than 20% of total development costs.

Id. § 45.02.

¹⁵¹ *Id.*

ered a limited dividend organization for purposes of section twenty of 40B.¹⁵² Projects proposed under the LIP must also address the most critical housing needs in the Commonwealth—"family and special needs housing in general and low income family housing in particular."¹⁵³

The LIP provides two ways for municipalities to develop low and moderate income housing: Local Initiative Units and Comprehensive Permit Projects.¹⁵⁴

1. Local Initiative Units

To form a Local Initiative Unit, the Chief Elected Official of a municipality must apply to the Department of Housing and Community Development (DHCD).¹⁵⁵ In addition, the units must meet five requirements.¹⁵⁶ First, they must be Low and Moderate Income Units.¹⁵⁷ Second, the units must not be developed with a comprehensive permit.¹⁵⁸ Instead, the units must be developed through the usual multi-permit system.¹⁵⁹ Third, the units must be subject to Use Restrictions that result from municipality action.¹⁶⁰ Fourth, the initial period of Use Restrictions must be as long as practicable, but not less than five years.¹⁶¹ Finally, the owner(s) of the units must agree to be subject to equal housing opportunity guidelines.¹⁶²

¹⁵² See *id.* A "limited dividend organization . . . agrees to limit the dividend on the invested equity to no more than that allowed by the applicable statute or regulations governing the pertinent housing program." *Id.* § 30.02.

¹⁵³ *Id.* § 45.07. It was necessary to limit elderly housing under the LIP. See *id.* § 45.07(2). In the early years of 40B's implementation, towns would allow construction of relatively uncontroversial elder housing, while still fully combating family housing, because, as noted earlier, towns did not want to bear the costs of educating more children. See *id.*; Reed, *supra* note 113, at 121. To give families their fair share of affordable housing, therefore, the Department of Housing and Community Development will not approve a project under the LIP if the proposal includes elderly housing which would account for more than five percent of the municipality's current year-round housing stock. See 760 CMR § 45.07(2).

¹⁵⁴ See 760 CMR §§ 45.03-.04.

¹⁵⁵ See *id.* § 45.03.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* § 45.03(1).

¹⁵⁸ See *id.* § 45.03(2).

¹⁵⁹ See *id.* § 45.03(2).

¹⁶⁰ See 760 CMR § 45.03(3).

¹⁶¹ See *id.* § 45.03(4).

¹⁶² See *id.* § 45.03(5).

2. Comprehensive Permit Projects

To form Comprehensive Permit Projects, the Chief Elected Official must likewise apply to the Department of Housing and Community Development, and the units must also meet five requirements.¹⁶³ First, at least twenty-five percent of the units must be Low and Moderate Income Units, though section 45.09 allows a waiver down to fifteen percent if a written finding is made stating that it is “necessary to allow the project to serve lower income households, to make such development in that city or town economically feasible, or to otherwise advance a legitimate public purpose.”¹⁶⁴ Second, the developer must execute a Regulatory Agreement.¹⁶⁵ Third, the units must be subject to Use Restrictions for the longest time allowed by law, though section 45.09 allows a waiver down to fifteen years if a lesser period is “necessary to advance a legitimate public purpose and that adequate measures are in place to prevent the displacement of low or moderate income occupants upon the expiration of such restrictions.”¹⁶⁶ Fourth, the developer or owner must implement an affirmative fair marketing plan as required by the Department of Housing and Community Affairs.¹⁶⁷ Finally, the project must have the written support of the Local Housing Partnership, a municipal advisory group appointed by the Chief Elected Official and recognized by the Massachusetts Housing Partnership Fund.¹⁶⁸

3. LIP Units Increase Both Subsidized Housing Inventories and Local Control

Building units under the LIP helps towns increase their low and moderate income housing inventory, while also protecting local interests.¹⁶⁹ By following LIP guidelines, municipalities can build Local Initiative Units and Comprehensive Permit Projects in order to increase their subsidized housing inventory¹⁷⁰ to ten percent of their

¹⁶³ See *id.* § 45.04; see also §§ 45.02, 45.09.

¹⁶⁴ *Id.* § 45.09; see *id.* § 45.04(1).

¹⁶⁵ See 760 CMR §§ 45.02, 45.04(2).

¹⁶⁶ *Id.* § 45.09; see *id.* §§ 45.02, 45.04(3).

¹⁶⁷ See *id.* § 45.04(4).

¹⁶⁸ See *id.* §§ 45.02, 45.04(5).

¹⁶⁹ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 22-27; see generally 760 CMR § 45.00.

¹⁷⁰ “Subsidized housing inventory” includes: (1) Local Initiative Units so long as Use Restrictions are in effect; and (2) Comprehensive Permit Projects so long as a Regulatory Agreement remains in effect, but only insofar as the units are low and moderate income

total housing stock and thus escape the jurisdiction of 40B.¹⁷¹ However, it is more advantageous to towns to build Comprehensive Permit Projects, and not Local Initiative Units, because all units of a Comprehensive Permit Project are included in the town's subsidized housing inventory if the percentage of low or moderate income units and the population and incomes served by the project are comparable to projects developed through another federal or state subsidy program in which all of the units are counted.¹⁷²

C. *The New England Fund*

1. How the New England Fund Works

Unlike more bureaucratic programs like FHA and MHFA, the NEF's financing program has few requirements and gives only a shallow subsidy.¹⁷³ While giving the developer some more flexibility, the NEF, like the LIP, also protects local interests.¹⁷⁴

The NEF is a program of the Federal Home Loan Bank of Boston (FHLBB), under which developers can receive below market rate construction loans to build housing or economic development projects.¹⁷⁵ Upon approval of a NEF application, the FHLBB advances funds to a member bank, which in turn makes a construction loan to a developer at a below market interest rate.¹⁷⁶ After some modifications in 1998, NEF Guidelines are now compatible with 40B requirements.¹⁷⁷

units. See 760 CMR § 45.06. However, all units of a Comprehensive Permit Project are counted if the Department of Housing and Community Affairs finds that the percentage of low or moderate income units and the population and incomes served by the project are comparable to projects developed through another federal or state subsidy program in which all of the units are counted. See *id.*

¹⁷¹ See MASS. GEN. LAWS ch. 40B, § 20; 760 CMR §§ 45.03-.04, 45.06-.07, 45.09.

¹⁷² See *id.* at 3; NEF Eligibility Guidelines, *supra* note 140.

¹⁷³ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 5, 7; NEF Eligibility Guidelines, *supra* note 140, at 2.

¹⁷⁴ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 25-28.

¹⁷⁵ See *id.* at 3; NEF Eligibility Guidelines, *supra* note 140.

¹⁷⁶ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 3.

¹⁷⁷ See *id.* at 3. In *Stuborn*, the HAC held that three criteria must be met for housing to be eligible for a comprehensive permit. See *id.* at 8. First, income of the occupants may not exceed 80% of the area median income as established by the U.S. Department of Housing and Urban Development for the relevant Metropolitan Statistical Area. See *id.* at 8; *Chapter 40B Subsidized Housing Inventory Through July 1, 1997 with adjustments through September 25, 1997* (last modified Sept. 25, 1997) <<http://www.state.ma.us/dhcd/components/hac/subhous.htm>>, at n.5(A)(1) [hereinafter *Subsidized Housing Inventory*]. Second, a minimum of 25% of the units must be for families at 80% or less of regional median household income. See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 8-9; *Subsidized Hous-*

For instance, the NEF and 40B both require that 25% of the occupants of any affordable housing development have incomes that are 80% or less of area median income.¹⁷⁸

2. The NEF Is a Low or Moderate Income Housing Subsidy Program for Purposes of a 40B Comprehensive Permit

In *Stuborn Ltd. Partnership v. Barnstable Bd. of Appeals*, the HAC considered for the second time whether a developer building affordable units with NEF funding is eligible for a comprehensive permit.¹⁷⁹ There, the HAC found that a NEF funded project can be built with a comprehensive permit, provided that the developer limits its dividends and assures the units' long-term affordability.¹⁸⁰ In its decision, the HAC considered two important questions: whether a NEF loan is a subsidy and whether the NEF is a low or moderate income housing program.¹⁸¹

a. A NEF Loan is a Subsidy

In *Stuborn*, the HAC held that a NEF loan is a subsidy for purposes of a comprehensive permit.¹⁸² There, the Cape Cod Bank and Trust Co., a member bank of the FHLBB, planned to borrow funds from the FHLBB.¹⁸³ Cape Cod Bank planned then to lend those funds

ing Inventory, *supra*, at n.5(A)(2). Third, the housing must remain affordable for a "lock-in period" of at least fifteen years. See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 9; *Subsidized Housing Inventory*, *supra*, at n.5(A)(2). In *Stuborn*, the developer met the first two eligibility criteria because the NEF eligibility guidelines specifically require the project to have at least 25% of the units affordable to persons with incomes at less than 80% of regional median household income. See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 11. Though the NEF does not require long-term affordability, the developer met the third criterion by agreeing to a deed rider locking in affordability in perpetuity. See *id.*

¹⁷⁸ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 3; *NEF Eligibility Guidelines*, *supra* note 140.

¹⁷⁹ See Decision on Jurisdiction, No. 98-01, *passim*. The HAC first faced this question in *Hastings Village Inc. v. Wellesley Zoning Bd. of Appeals*, where it found that under the circumstances, the NEF did not qualify as a low or moderate income housing subsidy program. See Memorandum on Motion to Dismiss, No. 95-05, at 6.

¹⁸⁰ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 8-12.

¹⁸¹ See *id.* In making its decision, the HAC also concluded that the NEF is a program of the federal government "[b]ecause the provision of affordable housing financing is an essentially governmental function, and also because of the NEF's legislative underpinnings, the public nature of the funds, and the supervision provided by the Federal Housing Finance Board" *Id.* at 16; see also 760 CMR § 30.02 (requiring that the subsidy come from a federal or state body).

¹⁸² See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 12.

¹⁸³ See *id.* at 11.

at a low interest rate to Stuborn, the developer, who planned to use the funds to build affordable condominium housing.¹⁸⁴ After Stuborn Ltd. Partnership filed a comprehensive permit application with the Barnstable Board of Appeals, the Board denied the permit on jurisdictional grounds.¹⁸⁵ The Board did not address the merits of the proposed housing development.¹⁸⁶ The Board argued, among other things, that the NEF was not a subsidy program.¹⁸⁷

The HAC, however, found that the NEF is a subsidy program for purposes of 40B for two reasons. First, the Massachusetts Supreme Judicial Court has “noted that the word ‘subsidy’ should not be limited to grants of money, but rather should include ‘[h]elp, aid, [or] assistance’ generally.”¹⁸⁸ Second, a NEF loan is similar to financing under MHFA, which has been considered a subsidy under 40B since 1982.¹⁸⁹ The HAC noted that the intention of the Act instituting MHFA was to make below market mortgage financing available.¹⁹⁰ The interest savings generated by MHFA financing would allow for lower rents for low and moderate income tenants.¹⁹¹ The HAC reasoned that, because the purposes of the NEF and MHFA are the same,

¹⁸⁴ See *id.* at 1, 11.

¹⁸⁵ See *id.* at 1.

¹⁸⁶ See *id.* Jurisdictional regulations of 40B provide that the applicant must be a public agency, a non-profit organization, or a limited dividend organization. See 760 CMR § 31.01(1)(a).

¹⁸⁷ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 2. The Board also argued that Stuborn was not a limited dividend organization, as required by 40B. See MASS. GEN. LAWS ch. 40B, §§ 20, 21; *Stuborn*, Decision on Jurisdiction, No. 98-01, at 2; 760 CMR § 30.02. The HAC, however, found that Stuborn was a limited dividend corporation. See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 17. Chapter 40B does not define the extent to which a developer must limit its profitability in order to be considered a limited dividend organization. See generally MASS. GEN. LAWS ch. 40B, §§ 20-23. Rather, any applicant who “agrees to limit the dividend on the invested equity to no more than that allowed by the applicable statute or regulations governing the pertinent housing program” is considered a limited dividend corporation. See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 17; 760 CMR § 30.02. In *Stuborn*, the developer agreed to execute a regulatory agreement limiting its profits to 20% of total development costs. See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 17. The HAC found this acceptable because it was consistent with other affordable housing programs that meet the requirements of 40B and because it would be enforceable by means of the regulatory agreement. See *id.*

¹⁸⁸ *Stuborn*, Decision on Jurisdiction, No. 98-01, at 12 (quoting *Wellesley v. Housing Appeals Comm.*, 433 N.E.2d 873, 876 (Mass. 1982)); cf. *Charlesbank Apartments, Inc. v. Boston Rent Control Admin.*, 399 N.E.2d 1078, 1079, 1079 n.4, 1081 (Mass. 1980) (holding federal program that provided mortgage insurance was a subsidy program under Boston rent control ordinance).

¹⁸⁹ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 12.

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

and because the financing mechanisms of the two programs are quite similar, a NEF loan constitutes a subsidy.¹⁹²

b. *The NEF is a "Low or Moderate Income Housing Program"*

In *Stuborn*, the HAC held that the NEF is a low or moderate income housing program.¹⁹³ Three "fundamental criteria," argued the HAC, must be fulfilled for an affordable housing development to be eligible for a comprehensive permit.¹⁹⁴ First, the housing must be built for those whose income does not exceed 80% of median income for the relevant Metropolitan Statistical Area.¹⁹⁵ Second, at least 25% of the units must be for persons whose income does not exceed 80% of median income.¹⁹⁶ Finally, the housing must be "locked in" as affordable for at least fifteen years.¹⁹⁷

The HAC found that the housing proposed in *Stuborn* met these three requirements.¹⁹⁸ The NEF eligibility guidelines require that the incomes of at least 25% of the units' owners are no higher than 80% of the area median income, thus satisfying the first two criteria.¹⁹⁹ Furthermore, while the NEF itself does not require any affordability "lock in," the developer agreed to deed restrictions which limit the sale of any affordable unit to other persons of low or moderate income.²⁰⁰

c. *Long Term Project Monitoring to Protect Towns' Interests*

If a comprehensive permit permanently changes a town's zoning, according to the HAC, then it deserves oversight of the project by a subsidizing agency.²⁰¹ Though 40B does not explicitly address this

¹⁹² See *id.*

¹⁹³ See *id.* at 11.

¹⁹⁴ See *id.* at 8.

¹⁹⁵ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 8; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 8.

¹⁹⁶ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 9; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 9. If the income limitation for occupants is less than 80% under the NEF, then 40B may allow a lower proportion of affordable to market rate units. See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 9 n.7. For example, TELLER and the Low Income Housing Tax Credit programs qualify. See *id.* Those programs require that 20% of the units be affordable to persons with incomes not exceeding 50% of median income. See *id.*

¹⁹⁷ See *id.* at 9; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 9.

¹⁹⁸ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 11.

¹⁹⁹ See *id.*; *NEF Eligibility Guidelines*, *supra* note 140.

²⁰⁰ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 11.

²⁰¹ See *id.* at 25-26.

thorough oversight, towns have gradually come to expect it.²⁰² Under more command-and-control-style housing programs like MHFA, long term monitoring of the project is performed by the subsidizing government agency.²⁰³ The FHLBB, on the other hand, plays no significant role in long term monitoring of its NEF projects.²⁰⁴

To make up for the lack of long term monitoring, the developer in *Stuborn* signed a monitoring services agreement with the Citizens Housing and Planning Association (CHAPA), a statewide not-for-profit housing organization.²⁰⁵ Under the agreement, CHAPA agreed to monitor the developer's profits and the initial sales prices of affordable units, two primary concerns of the town.²⁰⁶ The HAC, in response to the town's concern that CHAPA may not enforce these requirements, suggested that the town could protect itself by requiring that the town become a party to the monitoring agreement.²⁰⁷ If the town became a party to the agreement, then it could protect its own interests by enforcing the agreement itself and passing the costs on to the developer.²⁰⁸

The HAC noted that it would have preferred the developer to use a government agency such as MHFA, DHCD, or a local housing authority to perform long term monitoring, even if day-to-day duties were subcontracted to a private entity.²⁰⁹ A government agency, the HAC argued, is subject to public oversight.²¹⁰ In addition, a government agency has a greater sense of permanence than a private organization, like CHAPA.²¹¹

²⁰² *See id.*

²⁰³ *See id.* at 19.

²⁰⁴ *See id.* at 25.

²⁰⁵ *See Id.* at 26.

²⁰⁶ *See Stuborn*, Decision on Jurisdiction, No. 98-01.

²⁰⁷ *See id.* at 26-27.

²⁰⁸ *See id.* at 27-28.

²⁰⁹ *See id.* at 26.

²¹⁰ *See id.*

²¹¹ *See id.*

V. DEVELOPERS SHOULD BE ALLOWED TO BUILD AFFORDABLE HOUSING PROJECTS UNDER 40B WITHOUT A GOVERNMENT SUBSIDY

A. Government Housing Financing Has Shifted from Command-and-control Programs to Market-Based Incentive Programs

Despite the modest successes of the Comprehensive Permit Law, there is still a growing need for affordable housing in Massachusetts.²¹² When 40B was passed, federal and state governments still built, managed, and maintained low and moderate income housing.²¹³ As public attitudes toward poor people and housing projects changed in the 1970s and 1980s, federal and state governments began to get out of the affordable housing business.²¹⁴ Instead of acting as landlords, federal and state governments provided large, "deep" subsidies in the form of cash or tax incentives.²¹⁵ Now, shallow subsidies and market-driven development have supplanted the deeper subsidies and command-and-control programs of the 1970s and 1980s.²¹⁶

In the 1990s and the new millennium, government programs have tried to harness the discipline provided by market forces.²¹⁷ The HAC noted in *Stuborn* that MHFA, a quasi-public housing entity, was the first step toward market-based incentives and away from command-and-control.²¹⁸ MHFA programs and the LIP minimize cash subsidies and bureaucratic supervision, while allowing private developers to provide affordable housing based on market conditions.²¹⁹

In the absence of "deep" government subsidies, Massachusetts should continue to encourage towns to use the LIP.²²⁰ Use of the LIP, however, has limitations.²²¹ First, the LIP requires the local Chief

²¹² See *Subsidized Housing Inventory*, *supra* note 177, at 1-7. As of 1997, only 23 Massachusetts communities have more than 10% subsidized housing. See *id.*

²¹³ See *Hastings Village, Inc. v. Wellesley Zoning Bd. of Appeals*, Memorandum on Motion to Dismiss, No. 95-05, slip op. at 4 (Mass. Housing Appeals Comm., Mar. 21, 1996).

²¹⁴ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6-7; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 4.

²¹⁵ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6-7; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 4.

²¹⁶ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6-7; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 4.

²¹⁷ See *id.* at 7; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 26.

²¹⁸ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6-7; see also *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 26.

²¹⁹ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 7.

²²⁰ See 760 CMR § 45.00; *Stuborn*, Decision on Jurisdiction, No. 98-01, at 7.

²²¹ See 760 CMR §§ 45.03-.04.

Elected Official to apply to DHCD for project approval.²²² If the chief elected official is against the project, it will not be built under the LIP.²²³ Thus, the LIP is only useful when the developer is “friendly”; that is, when the town and the developer can negotiate the comprehensive permit reasonably well.²²⁴ In addition, absent a local subsidy, the LIP would only encourage private development in areas where the housing market is strong enough to permit developers to make a profit from being able to build more units per acre.²²⁵

The Massachusetts Legislature should also embrace the HAC’s decision that the NEF qualifies as a government subsidy program under 40B.²²⁶ Recognition of the NEF as a government subsidy for purposes of 40B is crucial to current efforts to build more affordable housing.²²⁷ Not only is a market incentive program like the NEF crucially needed, the HAC sees NEF funding as part of a trend toward privatization of the affordable housing industry.²²⁸

B. Developers Should Be Able Internally to Subsidize Their Projects and Still Take Advantage of the Comprehensive Permit Law

Currently, privatization of the affordable housing industry cannot occur under 40B because the law still requires the developer to obtain a government subsidy.²²⁹ The developer in *Stuborn* was allowed to file a comprehensive permit only because the HAC held that the NEF was a government subsidy program.²³⁰ While the HAC’s decision that the NEF qualifies as a government subsidy should be considered progress toward privatization, the decision still perpetuates the antiquated notion that a government subsidy is necessary to make all affordable housing projects financially feasible for developers.²³¹ In addition, the LIP, while helpful, only helps build affordable units where local forces are in favor of them.²³²

²²² See *id.*

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *supra* notes 130–142 and accompanying text.

²²⁶ See *Stuborn*, Decision on Jurisdiction, No. 98–01, at 8.

²²⁷ See *id.* at 7.

²²⁸ See *Hastings Village, Inc. v. Wellesley Zoning Bd. of Appeals*, Memorandum on Motion to Dismiss, No. 95–05, slip op. at 26 (Mass. Housing Appeals Comm., Mar. 21, 1996).

²²⁹ See MASS. GEN. LAWS ch. 40B, § 21; 760 CMR § 30.02.

²³⁰ See *Stuborn*, Decision on Jurisdiction, No. 98–01, at 8.

²³¹ See *id.*

²³² See 760 CMR §§ 45.03–.04.

Given the weaknesses of the LIP and the NEF, if Massachusetts wants to fill the growing affordable housing need, the Legislature should finally eliminate the government subsidy requirement of 40B.²³³ Elimination of the subsidy requirement would give developers the freedom to build affordable units with comprehensive permits without obtaining unnecessary government subsidies.²³⁴ Roman Petyk and Daniel Sullivan advocated for the elimination of the subsidy requirement as far back as 1986.²³⁵ Since 40B was passed in 1969, the comprehensive permit process has changed considerably, constantly accommodating new subsidy programs.²³⁶ 40B should continue to evolve by embracing the shift in affordable housing financing from command-and-control to market-based incentive programs.²³⁷

In rising real estate markets, usually in suburbs closer to cities, developers can develop more densely under a comprehensive permit since they do not need to follow restrictive local zoning bylaws.²³⁸ The ability to build more units on the same land often allows developers to structure developments so that cash subsidies are not required for profitability at all.²³⁹ To qualify for a comprehensive permit, a developer need only build 25% of the project as affordable housing.²⁴⁰ If a developer is allowed to build two or three times more units per acre with a comprehensive permit than she can without a comprehensive permit, it would be more profitable to build an affordable housing development than a strictly market rate development.²⁴¹

In these rising markets, then, no financial subsidy is required to attract developers to build affordable housing.²⁴² Under these conditions, the government subsidy requirement actually prevents affordable housing from being built where it is needed most—in rising real estate markets.²⁴³ When the real estate market falls or remains stable and government subsidies are required to make affordable projects

²³³ See MASS. GEN. LAWS ch. 40B, § 21; 760 CMR § 30.02; Petyk & Sullivan, *supra* note 114, at 16.

²³⁴ See Petyk & Sullivan, *supra* note 114, at 16.

²³⁵ See *id.* at 10, 16.

²³⁶ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 6.

²³⁷ See *id.* at 6-7.

²³⁸ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 28.

²³⁹ See *id.*; Petyk & Sullivan, *supra* note 114, at 16.

²⁴⁰ See *Stuborn*, Decision on Jurisdiction, No. 98-01, at 9; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95-05, at 9; *Subsidized Housing Inventory*, *supra* note 177, at n.5(A)(1).

²⁴¹ See Petyk & Sullivan, *supra* note 114, at 16.

²⁴² See *id.*

²⁴³ See *id.*

feasible, developers should be free to follow the current comprehensive permit procedure.²⁴⁴

C. Towns' Concerns Should Be Mitigated by Government Agency Oversight and More Active Local Involvement in Developing Affordable Housing

Towns should be concerned about the elimination of the government subsidy requirement, especially since their zoning is permanently changed whenever an affordable development is built.²⁴⁵ The HAC, therefore, should ensure that projects are monitored in the long term.²⁴⁶ Requiring an affordable housing development to be tied to a specific existing housing program, as is now required under 40B, seeks to preserve towns' resources by assuring that proposed projects will actually be built if they are approved.²⁴⁷ Additionally, as mentioned earlier, requiring a government subsidy stops unrealistic proposals from proceeding and stops sites from being tied up by a pending comprehensive permit.²⁴⁸

The same protection given to towns under the current requirements of 40B should be provided by government agency oversight.²⁴⁹ Government agency oversight is preferable to private oversight for two reasons.²⁵⁰ First, a government agency would be open to public scrutiny, just as site letters are now under 40B comprehensive permits.²⁵¹ Furthermore, government agencies are more permanent than private organizations.²⁵²

Specifically, the Legislature should amend 40B or require DHCD to pass new regulations allowing DHCD or a local housing authority to oversee the building, operation, and maintenance of affordable units.²⁵³ Under this proposal, the overseeing government agency should require the developer to sign a regulatory agreement that makes the agency, the developer, and the town parties with enforce-

²⁴⁴ See MASS. GEN. LAWS ch. 40B, §§ 20–23; 760 CMR §§ 30.00, 31.00.

²⁴⁵ See *Stuborn*, Decision on Jurisdiction, No. 98–01, at 18; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 28.

²⁴⁶ See *Stuborn*, Decision on Jurisdiction, No. 98–01, at 18; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 28.

²⁴⁷ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 27.

²⁴⁸ See *id.* at 25.

²⁴⁹ See *Stuborn*, Decision on Jurisdiction, No. 98–01, at 28.

²⁵⁰ See *id.* at 26.

²⁵¹ See *id.*; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 25.

²⁵² See *Stuborn*, Decision on Jurisdiction, No. 98–01, at 26.

²⁵³ See *id.* at 6.

ment rights.²⁵⁴ The new regulations should also require the developer to pay for the initial oversight of the project until the percentage of affordable units, dividend limitations, and affordability lock-in are completed.²⁵⁵ Because the need for construction of affordable housing is a statewide need, the Legislature should appropriate funds to pay for continuing oversight.²⁵⁶

Ideally, there should also be stronger local involvement in affordable housing development because it is in towns' best interests.²⁵⁷ If towns cooperate with developers, local needs are less likely to be ignored.²⁵⁸ One way for towns to get more deeply involved is local housing authority oversight of affordable housing developments.²⁵⁹ Rather than letting a state agency oversee developments, local housing authorities could more carefully protect their own interests while still contributing to the region's affordable housing need.²⁶⁰

CONCLUSION

After over one hundred years, the United States is still in an affordable housing crisis. The causes of the crisis are myriad, but the greatest culprit is local land use regulation. Restrictive zoning—large minimum lot sizes and height and use restrictions—makes construction of new units of affordable housing infeasible.

Early approaches to affordable housing followed a command-and-control model of regulation. Government acted as landlord. To remedy the shortage of housing, federal and state governments designed, built, and managed affordable housing units. Frustration with poorly maintained, crime ridden high-rise housing projects, along with a general political shift toward privatization, caused government to get out of the landlord business. Gradually, government began to repeal command-and-control housing programs and replace them with market-based incentives and subsidies.

Massachusetts's Comprehensive Permit Law harnessed the new wave of market-based incentives and government subsidies by allowing developers with subsidies to override restrictive local zoning prac-

²⁵⁴ See *id.* at 26–27; *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 28–29.

²⁵⁵ See *Hastings Village*, Memorandum on Motion to Dismiss, No. 95–05, at 22, 28–29.

²⁵⁶ See *id.*

²⁵⁷ See *Stuborn*, Decision on Jurisdiction, No. 98–01, at 28.

²⁵⁸ See *id.* at 18, 27–28.

²⁵⁹ See *id.* at 26.

²⁶⁰ See *id.*

tices. Compared to the command-and-control housing programs of the Great Society, 40B has increased local control over affordable housing. It has also made the affordable units more desirable. "Thirty years ago," the HAC noted in *Stuborn*, "towns that were actively opposed to affordable housing were forced to accept cookie-cutter, rental, low income housing developments developed by bureaucracies in Boston or Washington, D.C. Today's affordable housing is more varied, typically mixed-income, and as frequently homeownership as rental."²⁶¹

While we have made some progress in addressing the affordable housing crisis in Massachusetts, much more needs to be done. Further progress requires political courage. While real estate prices have been quickly rising, construction of affordable units has been puttering along, not able to keep pace with home and rental costs. Even though subsidies are not necessary to make affordable housing construction lucrative in areas of quickly rising real estate prices, 40B still requires developers to obtain subsidies if they want the benefit of a local zoning override. Therefore, the subsidy requirement under 40B should be repealed, and the oversight that subsidizing agencies have been providing should be done by the Department of Housing and Community Development or local housing authorities. This one small step will help give more people a decent place to live.

²⁶¹ *Stuborn*, Decision on Jurisdiction, No. 98-01, at 28.